incorporate the concept of 'criminal' or 'gross' negligence. That section now reads as follows:

"CAUSING DEATH BY GROSS NEGLIGENCE.

304A. (1) Whoever causes the death of any person by any act which is so negligent as to amount to a reckless disregard for human life, shall be guilty of an offence: Penalty, imprisonment for fifteen years, with or without a fine.

(2) Any person charged with an offence against this section may, subject to the provisions of section 156 of the Criminal Procedure Code, be convicted of any minor offence involving negligence whether or not any notice of intention to prosecute for such offence required by any written law to be served on a person accused of such offence has been served."

There can be little doubt that the decision in *Mill's* case was more in line with the reasoning in *Woo Sing and Sim Ah Kow* v. *Regina* (3) and with that of Buhagiar J.'s dicta in *Anthonysamy* v. *Public Prosecutor* (4) than with those decisions which would purport to distinguish between any concept of civil and criminal negligence.

Thus, section 304A apart, the question is was the appellant negligent in doing what he did and was that negligence of a kind which endangered human life.

Here I am satisfied that the facts amply proved those two points and that they were fully appreciated by the trial magistrate. I therefore dismiss this appeal.

Appeal dismissed.

M. S. ALLY & CO. LTD. v. CALHAEM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) September 3, 1964]

[K.L. — Federal Court Civil Appeal No. 34 of 1964]

Practice and Procedure — Application to strike out statement of claim — Attachment order made by court under judgment subsequently set aside — Whether damages can be sought for wrongful attachment — R.S.C., 1957, O. 25 r. 4.

The appellant had obtained judgment against the respondent for the sum of $753.37 and costs. This judgment was subsequently set aside on the ground that the summons had not been served on the respondent but on some other person. In the meantime the appellants had obtained an order of attachment of money owed to the respondent by a bank. This attachment was subsequently withdrawn a month before the judgment in respect of which it was issued was set aside. The respondent brought an action against the appellant for damages for wrongful attachment. The appellants thereupon took out a summons asking that the statement of claim be struck out and the action be dismissed. This application was dismissed ([1964] M.L.J. 289) and the appellants appealed.

Held: on the face of the pleadings the respondent did not have any cause of action whatsoever, as the attachment when issued was based on a good and unsatisfied judgment and therefore the statement of claim should have been struck out and the action dismissed.

Case referred to:—

(1) *De Medina* v. *Grove* 10 Q.B. 172, 177,

FEDERAL COURT.

P. J. Mooney for the appellant.

A. D. Rajah for the respondent.

Thomson L.P.: On 21st February, 1961, the present appellants obtained judgment against the respondent in the magistrate's court at Kuala Lumpur for a sum of $753.37 and costs. That judgment was not satisfied but on 28th November, 1963, it was set aside on the ground that the summons therein had not been served upon the respondent but on some other person. In the meantime, however, the appellant had obtained an order for the attachment of money owed to the respondent by a local bank. On 21st September, 1963, in pursuance of that Order the bailiff of the court attached a sum of $359.22. The attachment was withdrawn on 23rd October, 1963, that is to say a month before the judgment in respect of which it has issued was set aside.

On 3rd January, 1964, the respondent commenced the present proceedings against the appellants in the High Court. The endorsement on the writ was as follows:—

"The plaintiff's claim against the defendant is for damages for wrongful attachment by the defendant of the plaintiff's moneys in the hands of the Hongkong & Shanghai Banking Corporation, Kuala Lumpur, together with interest and costs."

The material portion of the statement of claim was as follows:—

"The attachment of the plaintiff's moneys with the said bank was wrongful and as a result of such wrongful attachment the plaintiff has suffered loss of reputation and had been wrongfully deprived of the use of his moneys with the said bank and thereby suffered damages."

It is only necessary to add that there was no claim for any special damages.

On 6th February, 1964, the appellants took out a summons under Order 25, rule 4, asking that the statement of claim be struck out and that the action be dismissed. That application was dismissed and against the order dismissing it the appellants have now appealed.

I refrain from expressing any opinion as to whether the respondent may have any remedy of any sort against the appellants, though I suppose the appellants have already paid some penalty in the way of costs. The present appeal, however, is to be decided on the pleadings and on the pleadings only and on them (and no attempt has been made at any time to amend them) I cannot see that the defendants have any cause of action whatsoever.

On the pleadings at the time of the attachment, and right down to the time it was withdrawn there was in existence a judgment which on the face of it was a good

judgment and unsatisfied. There is no allegation of fraud or malice or negligence or even of special damage.

As was said by Wilde C.J. in the case of *De Medina* v. *Grove* [1]:—

"there is no authority to show that the employment of either mesne or final process will furnish ground of action against the person employing it, unless he has acted maliciously and without probable cause."

Here there was no cause of action in the respondent. On the face of his own pleadings his action was hopeless and in the circumstances the statement of claim should have been struck out and the action dismissed.

I would allow the appeal with costs.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Lovelace & Hastings.*

PUBLIC PROSECUTOR v. TAN KING HUA

[R.Cr.J. (Lee Hun Hoe J.) September 9, 1965]

[Sibu — Criminal Revision No. 5 of 1965]

Criminal Law and Procedure — Sentence — Youthful offender — Matters to be taken into consideration in assessing sentence.

In this case the magistrate had sentenced the accused who was 16 years of age to 1 year's imprisonment for theft. The accused had a previous conviction also for theft, for which he had been committed to the Sibu Boys' Club and Hostel, which is an approved institution.

Held: everything reasonable should be done to avoid sending a youthful offender to prison if other suitable punishment is available and therefore in this case the sentence of imprisonment must be set aside and the accused committed to the Sarawak Boys' Home for two years.

CRIMINAL REVISION.

Lee Hun Hoe J.: As a result of information received from the assistant probation officer, Sibu I called for and examined the record of this case to satisfy myself as to the correctness, legality or propriety of the finding, sentence or order recorded or passed and as to the regularity of the proceeding.

Accused is only 16 years of age and is the issue of a Chinese father and an Iban mother. He was brought up by his parents in Binatang. On 5th August, 1964, when he was 15 years of age he was convicted in the police court, Binatang for an offence of theft under section 379 of the Penal Code. Because of his antecedents and age the magistrate transferred his case to this court under section 241 of the Criminal Procedure Code with a view of having the offender committed to custody.

Having read the report of the assistant probation officer and heard him this court ordered accused to be committed to the Sibu Boys' Club and Hostel which is an approved institution for a period of two years subject to the supervision of the assistant probation officer, Sibu. Although there is a warder in charge of this institution not very strict discipline was imposed on those who stayed there.

However on 5th July, 1963 during his stay in the institution he stole a bicycle while he was in the town. On 8th July, 1963 he was charged and convicted by the district court, Sibu for an offence under section 379 of the Penal Code. In view of his antecedents the learned magistrate sentenced him to a year's imprisonment.

I consider that the learned magistrate was wrong to impose a sentence of imprisonment in this case in view of the accused's age. Where a youthful offender is involved it is advisable for magistrates to take advantage of the probation service. Had he called for a report from the assistant probation officer, Sibu he would probably have taken a different course.

Youthful offenders should be treated with sympathy and understanding. In most cases they get into trouble because of poor family upbringing and lack of proper control.

There are provisions in the Criminal Procedure Code for dealing with youthful offenders and advantage should be taken of those provisions. The main consideration in dealing with a youthful offender must always be to help him to become a good and useful citizen. To allow him to mix with hardened criminals in his early life would cause him harm in his later life. Everything reasonable should be done to avoid sending such an offender to prison if other suitable punishment is available.

Since he did not appreciate his stay at the Sibu Boys' Club and Hostel then he should be sent to the Sarawak Boys' Home, Kuching, where very strict discipline is imposed and where he may become something useful.

Accordingly I set aside the sentence imposed by the district court, Sibu and order that Tang King Hua be committed to the Sarawak Boys' Home, Kuching for a period of two years as from today. As a result of this order the order of committal to the Boys' Club and Hostel made on 17th August, 1964 by the court is cancelled as from today.

Order accordingly.